

1 on that point, if I am --

2 MS. WALLMAN: Correct. I  
3 understand that much. I understand that Mr.  
4 Beckner's concerns do go into the prospect  
5 that it might be delved into or relied upon  
6 for the prospect that Colleen said, "I like  
7 it, I get it." I thought we were not talking  
8 about that anymore. I thought we were only  
9 talking about the first two purposes for which  
10 it might be admitted.

11 JUDGE SIPPEL: Yes. But I am  
12 still getting an objection to the fact -- if  
13 I am understanding the objection, the scope of  
14 the objection -- I understand the objection,  
15 but the scope is that you don't even want it  
16 in for the purpose of saying that a call was  
17 made by that person on that date.

18 MR. MILLS: Well, I would just ask  
19 that that part of it be reserved until we have  
20 the testimony.

21 MR. BECKNER: But this particular  
22 document -- Exhibit 50 -- and I not speaking

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1 about the others. This Exhibit 50 doesn't say  
2 on its face who made the report.

3 JUDGE SIPPEL: Well, that is  
4 problematic.

5 MR. BECKNER: Okay. I think there  
6 are others in here which do say who made the  
7 report. But this one here that we are talking  
8 about -- Exhibit 50 -- doesn't even say who  
9 made the report.

10 MS. WALLMAN: Well, may I just  
11 state with respect to -- using the example of  
12 an e-mail, we take the from line to mean that  
13 the person it is from is who it is from. This  
14 is a call report in the apparent format of two  
15 attendees. Colleen Dillaway is a Bright House  
16 employee. Nico Fasano is a WealthTV employee.

17 I don't think it takes a great  
18 leap of inference to say that it probably  
19 wasn't Colleen who wrote it. Nico was the  
20 only other person there; Nico wrote it.

21 JUDGE SIPPEL: Well, the logic is  
22 fine. But the -- you know, the -- but the

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1 evidence, it isn't that tight.

2 Look, I don't think that we should  
3 really agonize on this. You say you have a  
4 series of call reports, is that correct?

5 MR. MILLS: Yes. There are a  
6 number of them, which we can --

7 MR. COHEN: 50 and 51 are both  
8 Bright House, and then there are more that  
9 begin with 99, Your Honor.

10 MR. MILLS: Yes. I have got them  
11 --

12 JUDGE SIPPEL: Well, why don't we  
13 let them all come in as business practice.

14 MR. MILLS: Solely for that -- for  
15 the purpose of --

16 JUDGE SIPPEL: Solely for that  
17 purpose. And what use gets made of them down  
18 the road we just have to get to it when we get  
19 to it.

20 MR. MILLS: That is fine.

21 JUDGE SIPPEL: We can save some  
22 time, if nothing else.

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1 MR. SCHONMAN: What numbers are  
2 we --

3 MR. COHEN: We can help with this.  
4 50 --

5 JUDGE SIPPEL: Well, let's start  
6 with 50. And what is another one?

7 MR. COHEN: 51, 99.

8 JUDGE SIPPEL: 50 -- wait a  
9 minute. 50, 51, 99. Go ahead.

10 MR. COHEN: 100, 101, 102, 103,  
11 104. Any others that you have there?

12 MR. MILLS: Yes. And there is  
13 123, 124, and that is it.

14 JUDGE SIPPEL: So that is a total  
15 of -- in addition to what we -- well, we did  
16 50. We just did 50, and I am going to receive  
17 50 as identified for purposes of it simply as  
18 being one of a series of call reports that  
19 were prepared as a business practice in 2004.

20 (Whereupon, the above-referred to  
21 document was marked as WTV Exhibit  
22 No. 50 for identification, and was

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1 received in evidence.)

2 But -- and after that, there is  
3 one, two, three, four, five, six, seven,  
4 eight, nine -- nine in addition to 50. And  
5 those are going to be received. Again, they  
6 will be identified for the record as call  
7 reports, WealthTV call reports, and they will  
8 be received at this point solely for purposes  
9 of showing that these were prepared as part of  
10 a business record in 2004.

11 (Whereupon, the above-referred to  
12 documents were marked as WTV  
13 Exhibits Nos. 51, 99, 100, 101,  
14 102, 103, 104, 123, and 124 for  
15 identification, and were received  
16 in evidence.)

17 Is it still the same timeframe?  
18 Is that right, Mr. Mills?

19 MR. MILLS: I think they are some  
20 they may have done in 2005, but 2004/2005.

21 JUDGE SIPPEL: All right.

22 MR. ROSE: So just for clarity,

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1 Your Honor, we have -- the exhibit numbers I  
2 wrote down were 50, 51, 99 to 104, 123, 124,  
3 and 150. Is that --

4 PARTICIPANT: Not 150.

5 MR. ROSE: Not 150, I'm sorry.

6 PARTICIPANT: Everything except  
7 150.

8 JUDGE SIPPEL: Well, is there -- I  
9 will read them again, 51, 99, 100, 101, 102,  
10 103, 104, 123, and 124. All right.

11 PARTICIPANT: Thank you.

12 JUDGE SIPPEL: So that is a help.  
13 Where can we go next?

14 MR. COHEN: 52.

15 JUDGE SIPPEL: Mr. Beckner?

16 MR. BECKNER: I am allergic to  
17 this one, Your Honor.

18 (Laughter.)

19 JUDGE SIPPEL: Are you okay?

20 MR. BECKNER: Yes, sure.

21 JUDGE SIPPEL: All right.

22 MR. ROSE: This one is a somewhat

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1 complicated scenario. Let me just try to  
2 explain what my understanding is of what the  
3 testimony will be as to what it is.

4 Mr. Herring wrote a text. He  
5 asked his administrative assistant to send it  
6 to the administrative assistant of an  
7 executive at Bright House, and there was a  
8 response by the executive to him. So Mr.  
9 Herring is actually the author of the text,  
10 although the e-mails indicate that the  
11 administrative assistants exchanged some of  
12 them.

13 52 I believe is the whole string,  
14 and 53 is a partial string. It is a copy of  
15 the same thing, but not the entire thing. So  
16 52 is the relevant exhibit.

17 The meeting -- once again, it is  
18 to show what he was pitching, what the  
19 branding was, what the type of thing he was  
20 trying to sell is. This one is a bit more  
21 than just a reminder of the date, but it is --  
22 obviously, he can talk about what he did

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1 pitch. But the e-mail opened the door, and  
2 then he went in it and pitched it. So two  
3 parts of the same thing.

4 JUDGE SIPPEL: But it starts off  
5 -- well, I have got -- I am sure there is  
6 another objection. But before I take the  
7 other side's objection, this says it is from  
8 Robert Herring -- that is the father -- to  
9 Charles Herring. Subject is WealthTV. And  
10 then, it goes down, forwarded message. What  
11 actually is transpiring here? This is March  
12 of 2008.

13 MR. ROSE: Robert Herring is a  
14 principal. The e-mails occurred in 2007, but  
15 the top thing is just a record of when it was  
16 printed I believe.

17 JUDGE SIPPEL: Yes, I realize  
18 that. But what is going on there?

19 MR. ROSE: It was printed off  
20 Robert Herring's --

21 JUDGE SIPPEL: Robert Herring is  
22 printing these out for Charles' benefit? This

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1 was in March of 2008.

2 MS. WALLMAN: If you could bear  
3 with me for one moment.

4 MR. ROSE: We are not quite sure  
5 why it was printed that date. Obviously, this  
6 proceeding had begun by then, but I don't  
7 know.

8 MR. FELD: The relevant  
9 informational portion of the e-mail is from  
10 Charles Herring to John Scaro on Monday, the  
11 12th of February 2007. Again, it is -- it is  
12 not clear why what was printed here was a --  
13 an additional e-mail, but the substance of  
14 part of the submission begins with the -- from  
15 Charles Herring, immediately below that.

16 JUDGE SIPPEL: All right. Well --

17 MR. ROSE: Just to continue the  
18 circle, another little piece is Exhibit 54,  
19 which was Charles Herring instructing his  
20 administrative assistant to cut his text into  
21 the e-mail that was then sent to the AA for  
22 the Bright House executive.

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1 JUDGE SIPPEL: Well --

2 MR. ROSE: 52 and 54 are part of  
3 the same thing, essentially.

4 JUDGE SIPPEL: And what is 53?  
5 How does that fit into the string?

6 MR. ROSE: It is a piece of the e-  
7 mail string. It appears to be just copies of  
8 what is in 52.

9 JUDGE SIPPEL: That is an  
10 interesting one. All right. So you've got  
11 52, 53, and 54 interrelated, even though 53  
12 may be just duplicative. And I am going to  
13 ask Mr. Beckner, then, to respond. I mean, it  
14 is --

15 MR. BECKNER: This is a long  
16 chain. I am not sure that, you know, a lot of  
17 it is relevant. I mean, we certainly, you  
18 know, don't have an objection to a copy of an  
19 e-mail that was sent by Steve Miron, you know,  
20 which is here of -- you know, of Bright House  
21 to I guess Tavyn Johnson and Charles Herring.  
22 And we -- you know, that was sent there.

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1           The e-mail from Tavyn Johnson, the  
2           fact that the e-mail was sent, we don't have  
3           a problem with that. You know, we have a  
4           hearsay problem with the content of the e-mail  
5           that is being offered for the truth of what is  
6           asserted, in particular the statement here,  
7           "Bright House, Tamp area, has contacted  
8           WealthTV," etcetera, etcetera. You know, that  
9           is obvious hearsay.

10           So I -- you know, I think -- I  
11           don't know that the -- you know, origin -- I  
12           mean, we are not disputing the fact that Tavyn  
13           Johnson, assistant to Charles Herring, sent  
14           this e-mail. You know, the origin of that,  
15           you know, Mr. Herring can certainly testify  
16           to.

17           But we certainly would only want  
18           this offered for the -- not for the truth, not  
19           for hearsay purpose, but simply for the fact  
20           that this e-mail was sent and this e-mail was  
21           received from Steve Miron.

22           MS. WALLMAN: Your Honor, may I

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1 suggest you take into consideration this group  
2 of exhibits in making your ruling. When we  
3 get to 54, I think that we will see that  
4 Charles is instructing his administrative  
5 assistant to cut and paste something that he  
6 authored, and send it as a courtesy -- send it  
7 to her correspondent, the administrative  
8 assistant, to Mr. Miron, and he will testify  
9 to that when he presents his testimony.

10 The e-mail return from Mr. Miron  
11 -- Mr. Miron is going to be here, he could be  
12 subject to cross examination on anything that  
13 I suppose we like. But I think we could take  
14 52, 53, and 54 together. There isn't a  
15 substantive hearsay problem here.

16 JUDGE SIPPEL: Well, I am not  
17 going to -- I think there is going to be  
18 disagreement on that. But let me -- I am  
19 trying to see a -- if there is any -- if there  
20 is any thread through here that makes it  
21 manageable. I am having -- oh, let me start  
22 off by asking the simple question: who is Mr.

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1 Miron? I mean, what is his position at Bright  
2 House?

3 MR. BECKNER: He is the CEO of  
4 Bright House Networks.

5 JUDGE SIPPEL: He is the CEO of  
6 Bright House.

7 MR. BECKNER: Yes, sir.

8 JUDGE SIPPEL: And he will be  
9 testifying, you said?

10 MR. BECKNER: That is correct.

11 JUDGE SIPPEL: And, again, I am  
12 going to -- I am going to reject these  
13 exhibits.

14 (Whereupon, the above-referred to  
15 documents were marked as WTV  
16 Exhibits Nos. 52, 53, and 54 for  
17 identification, but were rejected  
18 as exhibits.)

19 I just can't -- first of all, I  
20 don't think -- there is no clarity to them.  
21 They are most -- some of them, or most of  
22 them, as I am reading them anyway, would be

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1 recollection-type documents, which there has  
2 been no foundation laid.

3 And the last -- the one that has  
4 the most substance to it is conclusory  
5 hearsay, and that was my -- apparently by  
6 direction, pasted together. Well, you know,  
7 if you can paste together, good grief, you can  
8 speculate until the cows come home as to what  
9 we pasted together. I mean, that is really  
10 not a reliable description of a document.

11 MS. WALLMAN: Your Honor, if I may  
12 --

13 JUDGE SIPPEL: I'm sorry. It is  
14 not the description of a reliable document.

15 MS. WALLMAN: Your Honor, if I  
16 may --

17 JUDGE SIPPEL: I am going to  
18 receive these. I am going to let the -- I am  
19 going to let them come in, but only if -- only  
20 in connection with the witness.

21 MS. WALLMAN: Thank you, Your  
22 Honor.

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1 JUDGE SIPPEL: The cross  
2 examination witnesses.

3 MS. WALLMAN: Cross examination  
4 witnesses?

5 JUDGE SIPPEL: They are cross  
6 examination documents. That is correct.

7 MR. MILLS: They are not being  
8 admitted into evidence?

9 JUDGE SIPPEL: They are not being  
10 admitted into evidence at this point, but they  
11 can be used for cross examination of -- or to  
12 -- from your side of the table, from  
13 WealthTV's side, they can be used to --  
14 attempted to be used to refresh your  
15 recollection. And, where pertinent, they  
16 certainly can be used for the cross  
17 examination of Mr. -- of Bright House's CEO,  
18 Mr. Miron.

19 MS. WALLMAN: Naturally, we accept  
20 the ruling, Your Honor. There is nothing more  
21 germane to this case than what the defendants  
22 were told by WealthTV about WealthTV.

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1 JUDGE SIPPEL: Yes.

2 MS. WALLMAN: That they knew in  
3 the course of making their decision.

4 JUDGE SIPPEL: Well, then, that is  
5 why you can use these in that way. I mean, I  
6 am not denying you the use of them. You just  
7 can't walk them in at this point. And I am  
8 going to ask -- Mr. Schonman I think has  
9 something to say -- to add to this?

10 MR. SCHONMAN: No. I just wanted  
11 to clarify that your ruling goes to 52, 53,  
12 and 54.

13 JUDGE SIPPEL: That is correct.  
14 Yes, they are taken as a group, simply because  
15 -- and that includes, you know, duplicate  
16 copies, which I am not going to get into now,  
17 but we can move to strike those if we -- you  
18 know, if we are serious about these and we --  
19 when the witness takes the stand. Is my  
20 ruling clear?

21 MR. MILLS: The motion is denied,  
22 but they can be used for cross.

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1 JUDGE SIPPEL: Exactly. Or to --  
2 or for witness recollection, if used -- if  
3 there is a foundation laid, and if they are  
4 appropriate for that purpose. But I don't --  
5 you know, I don't think we need to go into  
6 that now, because we don't know what is going  
7 to happen. But you are not -- all right.  
8 That is -- I can't say anything more without  
9 repeating myself. That is how I get in  
10 trouble.

11 So 54 is the last one that we have  
12 ruled on. WTV Exhibit 55.

13 MR. ROSE: 55 is another record of  
14 a meeting that occurred. It is an e-mail that  
15 was -- I am not even sure was copied to Mr.  
16 Herring. It is just a record of a call that  
17 was made. It is not the call -- call report  
18 format, but simply that another call was made  
19 on Bright House in this case.

20 MR. FELD: I believe it is similar  
21 to 49, and that it is similar to 45, 47, 49,  
22 and, therefore --

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1 MR. ROSE: Well, it is not to  
2 refresh his recollection so much as it is the  
3 business record that a call was made.

4 MR. FELD: Oh, okay.

5 MR. ROSE: Once again, the witness  
6 won't be there to testify about it, and I  
7 believe Your Honor has already ruled on those  
8 kinds of exhibits before.

9 JUDGE SIPPEL: Well, the call  
10 reports -- there was a definitive ruling on  
11 call reports. But I have -- this kind of  
12 document, there is really no definitive  
13 ruling. I am inclined to add -- to reject it,  
14 because of all of the reasons that both sides  
15 are saying. I mean, there is just no -- well,  
16 there is no witness here to refresh your  
17 recollection with. So unless you can give me  
18 something better --

19 MR. ROSE: I am afraid I can't,  
20 Your Honor.

21 JUDGE SIPPEL: Okay. We will  
22 reject it and move on. It is identified and

1 rejected. This is Number 55.

2 (Whereupon, the above-referred to  
3 document was marked as WTV Exhibit  
4 No. 55 for identification, but was  
5 rejected as an exhibit.)

6 Okay. WTV -- so now you've got  
7 56.

8 MR. ROSE: 56 sort of mixes these  
9 categories. We have an e-mail chain between  
10 Mr. Herring and one of his sales employees.  
11 It is a listing of calls that that employee  
12 had made. It is the last couple of pages of  
13 that exhibit, I think the last three pages of  
14 it.

15 The first two pages are reports of  
16 the -- back and forth, Mr. Herring to his  
17 employee, about the calls, and so forth.

18 MR. COHEN: Your Honor, we object  
19 on hearsay grounds. Mr. Furman is not going  
20 to testify. The attached report was prepared  
21 by Mr. Furman in connection with another  
22 document that we are going to show Mr. Herring

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1 during his cross examination. He is actually  
2 I believe referring to Mr. Furman as the  
3 employee who sent in an unauthorized document  
4 and was fired. So I don't see how he is going  
5 to vouch for the authenticity of Mr. Furman's  
6 report.

7 JUDGE SIPPEL: All right..

8 MR. COHEN: In fact, I think on  
9 cross examination he is going to try to run  
10 away from the documents that we are going to  
11 show him by claiming that Mr. Furman is not  
12 reliable. So I don't see how, without Mr.  
13 Furman being here, this document can be  
14 admitted.

15 JUDGE SIPPEL: Well, how do you  
16 feel about that? Who is on this one, Mr.  
17 Feld?

18 MR. ROSE: It is the record they  
19 kept of the calls that Mr. Furman made. I  
20 don't believe it is produced for any other  
21 purpose.

22 JUDGE SIPPEL: Well, since he is

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1 not going to be -- well, I don't -- that is  
2 not a lone justification for receiving it. If  
3 you have a reason to bring it back in again  
4 after we get into this other --

5 MR. ROSE: There is one other  
6 purpose. I am sorry, Your Honor. The  
7 advertisers they are targeting is indicative  
8 of the kind of genre, if you will. These are  
9 advertisers that would advertise in the men's  
10 genre. I am sorry to use the word. We  
11 weren't comfortable with it this morning, but  
12 --

13 JUDGE SIPPEL: Well, I am  
14 comfortable with it. I just think -- you  
15 know, I am having a great time with it.

16 (Laughter.)

17 MR. ROSE: The fact that they were  
18 targeting these kinds of advertisers is also  
19 shown by this document.

20 MR. FELD: And in that regard, Mr.  
21 Herring can certainly testify from his  
22 personal knowledge that he instructed his

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1 then-employee Roger Furman with regard to  
2 advertising received, the types of advertisers  
3 that he was soliciting.

4 MR. COHEN: Well, Your Honor, he  
5 can testify to those things, but that doesn't  
6 cure the hearsay or reliability issue with  
7 respect to this document. Mr. Herring can  
8 testify to whatever instructions he gave Mr.  
9 Furman.

10 JUDGE SIPPEL: I'll agree with  
11 that. I mean, the problem that comes to my  
12 mind is that, if Mr. Cohen's proffer is true  
13 that Mr. Furman is not a -- is not a favorite  
14 person over at WealthTV, and what he has done  
15 is going to be attacked as either -- for  
16 whatever reason, and then this you want to use  
17 for purposes of showing that he knew what he  
18 was doing --

19 MR. FELD: No, Your Honor. If I  
20 may, our offer with regard to this evidence,  
21 as I understand it now, is that in fact Mr.  
22 Herring will testify to the nature of the

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1 instructions that he gave to his employees,  
2 including Mr. Furman.

3 Mr. Furman was ultimately fired,  
4 as Mr. Herring will testify, because, as Mr.  
5 Herring will testify, Mr. Furman was not  
6 fulfilling those responsibilities in an  
7 appropriate manner.

8 The evidence that is offered here  
9 is confirmatory to -- as a confirmatory piece  
10 of evidence or a confirmatory report that was  
11 made at the time when he was giving  
12 instructions to employees saying, you know,  
13 "What kind of advertising are you soliciting?  
14 Okay. These are the sorts of advertisers we  
15 want to have."

16 And that the purpose of the  
17 document here is that it is offered as  
18 supportive of Mr. Herring's testimony.

19 JUDGE SIPPEL: Okay. That's okay.  
20 Don't take it any further than that.

21 This is kind of like a wish list  
22 though. You don't have advertisers in all of

1       these fields, do you? I mean --

2                   MR. FELD: No.

3                   JUDGE SIPPEL:       -- this was  
4       successful. This is what he was trying to  
5       target.

6                   MR. ROSE: These are calls he  
7       made. These are advertisers he was --

8                   JUDGE SIPPEL: Well, we don't know  
9       that. We don't know he made the calls, but  
10      the best I can see out of this, it's a  
11      checklist of what would be desired as  
12      advertising, which you're saying then the  
13      argument can be made these are all unique for  
14      men as opposed to men and women.

15                  MR. FELD: To the issue of how  
16      well TV -- and Mr. Herring is the person  
17      conceptualized and was here testifying as to  
18      how that business plan worked at its target  
19      demographic and so forth and will support that  
20      with examples of the sorts of advertising they  
21      pursued. It is, we would argue, relevant to  
22      the issues that are being presented here.

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1 JUDGE SIPPEL: And you say that  
2 this list was made by Mr. Herring and given to  
3 the salesman to do? Well, who are we talking  
4 about?

5 MR. COHEN: Yeah, Mr. Furman  
6 created this list.

7 JUDGE SIPPEL: Mr. Furman created  
8 the list?

9 MR. COHEN: Yes.

10 MR. FELD: Mr. Furman created the  
11 list and sent it to Mr. Herring. Mr. Herring  
12 confirmed it, said, "Yes, this is the sort of  
13 advertising we want to present."

14 JUDGE SIPPEL: Well, when Mr.  
15 Herring gets on the stand, if you can  
16 establish it that way, then I will receive it  
17 for what it's worth as a list of the targets  
18 that he and Furman worked out together.  
19 That's all I can do with it.

20 So I'm not going to reject it now,  
21 but I'm not going to receive it either.  
22 That's in the reserve category, and that is